820 PRIVILEGE: SELF-DEFENSE: INJURY TO THIRD PARTY CHARGED AS RECKLESS OR NEGLIGENT CRIME — § 939.48(3)

INSERT THE FOLLOWING AFTER THE FIRST PARAGRAPH OF THE INSTRUCTION ON THE CRIME CHARGED BUT BEFORE THE ELEMENTS OF THE CRIME ARE DEFINED.

Self-Defense As To (Name Person)

There is evidence in this case that the defendant was acting in self-defense as to (name person).[1]

The fact that the law may allow the defendant to use force in self-defense as to (name person) does not necessarily mean that the causing of harm to (name victim)[2] was lawful. You must consider the law of self-defense in deciding whether the defendant's conduct as to (name victim) [was criminally reckless conduct which showed utter disregard for human life] [was criminally reckless conduct] [was criminally negligent conduct], but the defendant does not have a privilege of self-defense as to (name victim).

The law of self-defense allows the defendant to threaten or intentionally use force against another only if:

- the defendant believed that there was an actual or imminent unlawful interference with the defendant's person; and,
- the defendant believed that the amount of force (he) (she) used or threatened to use was necessary to prevent or terminate the interference; and,
- the defendant's beliefs were reasonable.

ADD THE FOLLOWING IF THERE IS EVIDENCE THAT THE FORCE USED WAS INTENDED OR LIKELY TO CAUSE DEATH OR GREAT BODILY HARM.

[The defendant may intentionally use force which is intended or likely to cause death or great bodily harm only if the defendant reasonably believed that the force used was necessary to prevent imminent death or great bodily harm to (himself) (herself).]

Determining Whether Beliefs Were Reasonable

A belief may be reasonable even though mistaken. In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense. The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of (his) (her) acts and not from the viewpoint of the jury now.

IF RETREAT IS AN ISSUE, ADD APPROPRIATE INSTRUCTION HERE – SEE WIS JI-CRIMINAL 810.

IF THERE IS EVIDENCE THAT THE DEFENDANT PROVOKED THE ATTACK, ADD APPROPRIATE INSTRUCTION HERE – SEE WIS JI-CRIMINAL 815.

CONTINUE WITH THE DEFINITION OF THE ELEMENTS OF THE CRIME.

FOR ALL OFFENSES INVOLVING CRIMINAL RECKLESSNESS OR CRIMINAL NEGLIGENCE, ADD THE FOLLOWING TO THE DEFINITION OF THE RECKLESSNESS OR NEGLIGENCE ELEMENT:

You should consider the evidence relating to self-defense along with all the other evidence in the case in deciding whether the defendant's conduct created an unreasonable

risk of death or great bodily harm to (name victim). If the defendant was acting lawfully in self-defense, (his) (her) conduct did not create an unreasonable risk to another. The burden is on the state to prove beyond a reasonable doubt that the defendant did not act lawfully in self-defense. And, you must be satisfied beyond a reasonable doubt from all the evidence in the case that the risk was unreasonable.[3]

FOR FIRST DEGREE RECKLESS OFFENSES ALSO ADD THE FOLLOWING TO THE DEFINITION OF THE "UTTER DISREGARD" ELEMENT:

[You should consider the evidence relating to self-defense in deciding whether the circumstances of the defendant's conduct showed utter disregard for human life. The burden is on the state to prove beyond a reasonable doubt that the defendant did not act lawfully in self-defense. And, you must be satisfied beyond a reasonable doubt from all the evidence in the case that the circumstances of the defendant's conduct showed utter disregard for human life.][4]

CONCLUDE WITH THE CONCLUDING PARAGRAPHS FROM THE INSTRUCTION FOR THE OFFENSE CHARGED.

COMMENT

Wis JI-Criminal 820 was originally published in 1962 and revised in 1994, 2006, and 2018. This revision was approved by the Committee. in October 2021; it added to the comment.

This instruction is intended to implement § 939.48(3), which provides as follows:

(3) The privilege of self-defense extends not only to the intentional infliction of harm upon a real or apparent wrongdoer, but also to the unintended infliction of harm upon a 3rd person,

except that if the unintended infliction of harm amounts to the crime of first-degree or 2nd-degree reckless homicide, homicide by negligent handling of dangerous weapon, explosives or fire, first-degree or 2nd-degree reckless injury or injury by negligent handling of dangerous weapon, explosives or fire, the actor is liable for whichever one of those crimes is committed.

The original version of Wis JI-Criminal 820 paraphrased the statute, explaining that the privilege of self-defense extended to the unintended infliction of harm to a third party, unless that infliction amounted to a crime involving what was formerly called "conduct regardless of life," reckless conduct, or criminal negligence.

The 2006 revision modified that approach, based on the assumption that the issue will arise in the context of a charge based on causing harm to the third party by criminally reckless or criminally negligent conduct. In that context, the Committee concluded that the preferred approach is to relate the defendant's exercise of the privilege to the establishment of the elements of the recklessness-based or negligence-based crime. Thus, the substance of this instruction is borrowed from Wis JI-Criminal 801, Privilege: Self Defense: Force Less Than That Likely To Cause Death Or Great Bodily Harm: Crimes Involving Recklessness or Negligence.

For example, assume that a defendant is charged with causing reckless injury to the victim, and raises the defense that he was acting in self-defense against someone else and thereby injured the victim. Criminal recklessness requires that the defendant's conduct created "an unreasonable and substantial risk of death or great bodily harm." [See § 939.24.] In considering whether the risk was "unreasonable," the jury should consider the evidence that the defendant was acting in self-defense. [See Wis JI-Criminal 801.]

It is possible that a case could involve a charge based on intentional harm to the third person – as under a statute such as § 940.19(1), simple battery, which applies to causing bodily harm with intent to cause harm to that person or another. In such a case, conduct that is privileged as to its intended target is also privileged as to the unintended third person who is injured. Such harm is "unintended" as that term is used in § 939.48(3), but it is "intentional" under the substantive statutes that define crimes in terms of intending to harm "that person or another." For that case, see Wis JI-Criminal 821, which provides that to establish the crime against the unintended victim, the state must prove beyond a reasonable doubt that the defendant was not privileged in the use of force against the intended target of that force.

Wisconsin law establishes a "low bar" that the defendant must overcome to be entitled to a jury instruction on the privilege of self-defense. State v. Stietz, 2017 WI 58, ¶16, 375 Wis.2d 572, 895 N.W.2d 796 citing State v. Schmidt, 2012 WI App 113, ¶12, 344 Wis. 2d 336, 824 N.W.2d 839. A defendant need only to produce "some evidence" in support of the privilege of self-defense. Stiez, supra, at ¶15. See also, State v. Head, 2002 WI 99, ¶112, 255 Wis.2d 194, 648 N.W.2d 413. Evidence satisfies the "some evidence" quantum of evidence even if it is "weak, insufficient, inconsistent, or of doubtful credibility" or "slight." State v. Schuman, 226 Wis. 2d 398, 404, 595 N.W.2d 86 (Ct. App. 1999). When applying the "some evidence" standard, a court is not to weigh the testimony, as this would invade that province of the jury. Stiez, supra, at ¶18. Instead, the court should focus on "whether there is 'some evidence' supporting the defendant's self-defense theory." Id. at ¶58. Failure "to instruct on an issue which is raised by the evidence" is error. State v. Weeks, 165 Wis. 2d 200, 208, 477 N.W.2d 642 (Ct. App. 1991).

In State v. Johnson, 2021 WI 61, 397 Wis.2d 633, 961 N.W.2d 18, the Wisconsin Supreme Court concluded that the trial court erred by declining to instruct on self-defense. The Court held that although Johnson unlawfully entered K.M.'s home in the middle of the night, there was some evidence that he had

an objectively reasonable belief that he was preventing an unlawful interference with his person. Although the physical attack in Johnson occurred entirely inside K.M.'s home, the opinion did not interpret, apply, or limit the castle doctrine in any way because the Court was tasked with examining Johnson's, not K.M.'s, actions. Therefore, this decision did not alter the "some evidence" standard used to determine whether a jury should be instructed on self-defense.

1. Here, use the name of the person against whom the defendant intended to use force in self-defense.

2. Insert the name of the injured party, who is the victim of the crime charged.

3. The last two sentences of this paragraph were added in 2018 in response to the decision in State v. Austin, 2013 WI App 96, 349 Wis.2d 744, 836 N.W.2d 833, in which the court of appeals ordered a new trial for a person convicted of 2nd degree recklessly endangering safety. The court held that the jury instructions given in that case – which followed the pattern suggested by Wis JI-Criminal 801 – were deficient because they did not specifically state that the prosecution must prove the absence of self-defense once raised. The same deficiency appeared in this instruction. The first of the added sentences is intended to make that requirement clear. The second added sentence is intended to emphasize that even if the state succeeds in proving the absence of self-defense, the jury still must be satisfied by all the evidence that the defendant's conduct created an unreasonable risk of death or great bodily harm.

4. The last two sentences of this paragraph were added in 2018 in response to the decision in State v. Austin, see note 3, supra. Austin was concerned with the "unreasonable risk" element of the offense, but the same concern should apply to the "utter disregard" element of 1st degree reckless offenses. The first of the added sentences is intended to make it clear that the prosecution must prove the absence of self-defense once raised to meet its burden to prove "utter disregard for human life." The second added sentence is intended to emphasize that even if the state succeeds in proving the absence of self-defense, the jury still must be satisfied by all the evidence that the circumstances of the defendant's conduct showed utter disregard for human life.